No. 16,089

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, LOCAL UNION No. 13-433,
Respondent.

BRIEF FOR THE RESPONDENT INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, LOCAL UNION NO. 13-433.

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Subject Index

Table of Authorities Cited

Cases

Texts

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THE RECORD.

This case is before this Court for the second time. On the first occasion the Board was directed to make a determination of the matter on its merits, a determination it had at that time declined to make. (*NLRB v. IWA, Local 13-433,* 238 F.2d 378.) The Board took the opportunity upon remand to not only make a determination on the merits, but to make new findings specifically designed to avoid the ruling of this Court in *N.L.R.B. v. Technicolor Motion Picture Corp.,* 248 F.2d 348. (R. 52-56.) These new findings were made

without giving Respondent an opportunity to be heard and to present evidence on what was admittedly a new theory of the case. Respondent made a motion to reopen the proceeding to present further evidence on the question of estoppel and waiver; the new theory on which the Board relied. This motion was denied. Petitioner's motion and the denial of the motion are not part of the printed record because these two documents were not certified by the Board as part of the record before this Court. (R. 57-59.) Respondent understands that the motion and the denial of the motion were filed with this Court on August 7, 1958. Respondent respectfully requests that this Court take notice of these documents either in their present form or that they be printed as supplements to the present printed record. Respondent has been unable to order the documents printed as the Board has not certified the documents as part of its record. It is noted that the "Certificate of the National Labor Relations Board" dated July 11, 1958 states, "The documents annexed hereto constitute a *full and accurate transcript of the entire record* of a proceeding had before said Board, known as Case No. 20-CB-408". (Emphasis added.) (R. 57.) The statement quoted is not accurate. This Respondent will treat the documents as part of the record on the assumption that the Board by filing the documents after its certificate of service acknowledges their place in the record. As will be apparent later in this brief the documents are of importance.

FACTS.

Most of the facts are undisputed. Respondent has read the Board's statement of facts contained in its brief. There is no serious disagreement with this statement but the arrangement and emphasis seem argumentative rather than informative. For this reason, Respondent sets forth here, in chronological order, the facts as established by the record.

1. October 4, 1950—The union and Ralph L. Smith Lumber Company (hereinafter referred to as the company) entered into a collective bargaining contract which was in effect at all times relevant to the above entitled case. The contract contains the following provisions:

> "Article II. Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the union, as a condition of employment, shall become and remain a member of the union. . . ." (R. 225.)

2. October 18, 1954—Charles R. Hatfield was employed by the company as a choker-setter. Hatfield in his capacity as a choker-setter was within the group of employees covered by the contract between the company and the union. (R. 15, 154-155, 225.)

3. November 15-30, 1954—Robert Crimmins, the business agent for the union, approached Hatfield and two other new employees and requested that these employees join the union. The three employees asked if they might wait until the spring of 1955 to join the union as they expected to be out of work during the winter. Crimmins consented to the proposal of the

three men *provided they joined the union immediately upon returning to work in the spring.* (R. 205.)

4. November, 1954—The company's woods operation shut down for the winter. All three men were out of work. (R. 116.)

5. March 15, 1955—The woods operation opened for the season and all three men returned to work. (R. 116.)

6. May 5, 1955—Ernest Dickey, the union's shop steward, asked all three men to join the union. Two of the three agreed to join and signed check-off slips providing for the withholding of initiation fees and one month's dues from the pay checks of these two men. The third man, Charles R. Hatfield, refused to sign the application card stating he had already applied for membership. (R. 157-159.)

7. May 6, 1955—Dickey reported the conduct of Hatfield to Crimmins. Crimmins informed Herbert Johnston, a confidential employee of the company, that the union would request the discharge of Hatfield. (R. 75-77.)

8. May 6, 1955—Crimmins wrote the company a letter requesting Hatfield's discharge. (R. 226.)

9. May 9, 1955—Crimmins' letter was received by the company. (R. 68.)

10. May 9 or 10, 1955—The contents of Crimmins' letter was communicated to Walter Hansen, the woods boss for the company. (R. 176.)

11. May 10, 1955—Hansen informed Hatfield he would have to join the union or be fired. (R. 176.)

12. May 5-10, 1955—Hatfield indicated he was not interested in joining the union. He expressed his feeling in strong language. (R. 184.)

13. May 11, 1955, morning—Johnston states Hatfield asked Johnston to sign him up in the union. Johnston referred Hatfield to Dickey, the job steward. (R. 79-80.)

14. May 11, 1955, morning—Crimmins told Hansen that he was not interested in Hatfield's joining the union and that he wanted Hatfield discharged. (R. 198-199.)

15. May 11, 1955, afternoon—Johnston states Hatfield repeated the request of the morning and was directed to Dickey. (R. 82.)

16. May 11, 1955, evening—The union members working in the woods voted to support Crimmins in the stand he was taking on Hatfield. (R. 200-201.)

17. May 12, 1955, morning—Hatfield signed a document stating his intention to join the union. This document was dated May 13, 1955. (R. 85-87.)

18. May 13, 1955—Johnston approached James Gordon, a shop steward who, up to then, knew nothing about the union's demands, and persuaded Gordon to allow Hatfield to sign a checkoff slip. Hatfield signed a checkoff for initiation fees and dues from November 1954. This slip was given to Johnston. (R. 89-98.)

19. May 13, 1955—Hatfield retracted his checkoff slip and signed a new slip allowing the checkoff of initiation fees and one month's dues. This amounted to $23.50. (R. 96-97.)

20. May 13, 1955—Johnston, in his capacity as company bookkeeper, erased a debt of $28.95 Hatfield owed the company. Johnston then debited Hatfield's account for $23.50 representing union initiation fees and one month's dues. (R. 112-116.)

21. May 13, 1955—Crimmins wrote the company a second letter demanding that Hatfield be discharged. (R. 227-228.)

22. May 17, 1955—Hansen discharged Hatfield. Hansen loaned Hatfield $100.00. None of this has been repaid. At the same time he made the loan, Hansen told Hatfield he should see an attorney. (R. 24, 180-183.)

23. June, 1955—Hatfield was rehired by the company. (R. 24, 239.)

24. July, 1955—Hatfield was fired by the company for not reporting to work as a result of being arrested for disturbing the peace. (R. 181.)

25. February 20, 1957—The Board in its original decision held that a late tender, if made before discharge, was valid. The Board relied on its own decision in *Technicolor Motion Picture Corporation,* 115 N.L.R.B. 1607. No mention was made of waiver or estoppel. (R. 45-52.)

26. February 24, 1958—After this Court issued its decision in *N.L.R.B. v. Technicolor Motion Picture Corp.,* 248 F.2d 348, the Board without notice issued a supplemental decision finding that Respondent waived its right to discharge Hatfield for failure to make a prompt tender of his fees and dues. (R. 52-56.)

27. June 24, 1958—Respondent made a motion to reopen the record before the Board for the purpose of offering testimony that Hatfield knew the union would not waive its rights to discharge prior to the time he signed his checkoff card. (This is one of the two documents not in the certified record but on file with this Court.)

28. July 18, 1958—The Board denied the Respondent's motion to reopen. (This is the other document not in the certified record but on file with this Court.)

ARGUMENT.

THE RESPONDENT HAS NOT BEEN GIVEN AN OPPORTUNITY TO BE HEARD ON THE THEORY OF THE CASE RELIED ON BY THE BOARD.

It is apparent from a cursory reading of the record and the brief filed by the Board that the original decision in this matter was formulated on the theory an unfair labor practice existed if Respondent refused to accept late tender.

In the *Technicolor* case, this Court specifically rejected the late tender argument. This Court did say, however,

> " an employee must not remain perpetually vulnerable to discharge because of tardiness in submitting initiation fees, irrespective of the conduct engaged in by the union or the employer." 248 F.2d 348 at 356.

Acting obviously upon this Court's suggestion the Board in its supplemental decision found a waiver by Respondent of its right to insist on discharge.

Respondent contends it was prejudiced by the refusal of the Board to grant a hearing on the new theory. The *Technicolor* opinion itself suggests that a hearing would be necessary.

> "Either the employer or the union may by its actions be estopped from asserting its particular rights under the collective bargaining agreement. But inherent in making such a determination is the balancing and accommodation of different interests and various factors based on policy considerations. The questions presented thereby are manifold. It would be necessary to ascertain what factors are relevant and the proportionate weight to be accorded each in the determination of whether a union is precluded to cause, or an employer to effect, the discharge of an employee based on failure to tender on time the uniformly required initiation fees under a valid union security agreement. *Moreover a conclusion predicated on equitable grounds denying Respondents the right to exercise their statute-approved contractual rights necessitates a complete and searching analysis of the particular factional situation.*" 248 F.2d 348 at 356. (Emphasis added.)

Keeping in mind the fact that all the testimony was taken under a different theory of the case it is difficult to see how the Board can maintain it had a sufficient record to make the determination required by this Court.

The unfairness to Respondent is even more apparent when the present method of decision making is matched against the Board's own rules. Rule 102.49

provides, in part, "The Board may at any time *upon reasonable notice* modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it." (Emphasis added.) No notice was given Respondent of the Board's intention to modify its original order dated February 20, 1957. The decision was made without taking further testimony. No opportunity to argue was given the Respondent. It appears from the uncertified papers on file with this Court that Respondent asked for a hearing upon receiving the supplemental decision of the Board. The request was denied.

It is difficult to see how a sound, equitable policy can be established by the Board in a proceeding which itself is inequitable. Even though further evidence was not permitted, Respondent should have at the very least been afforded a chance to argue the matter. As this Court suggested, the "questions presented thereby are manifold." (248 F.2d 348 at 356.) Respondent submits that the Board in making its supplemental decision without taking further evidence, without permitting Respondent to be heard and without giving Respondent notice, committed error.

Discussion concerning the theory of estoppel and waiver is contained in the closing portion of this brief. In connection with the failure of the Board to give Respondent notice of its modification of the original order it might be well to note certain items contained in the present record which have a bearing on the equitable factors of the case. These items might well be determinative upon further development of the

record. Respondent should have an opportunity to develop them.

1. Hatfield, the subject of the equitable right, was discharged by the company shortly after he was rehired upon the filing of the unfair labor practice in the present case. Wouldn't Hatfield's own attitude about his job be relevant when measuring equitable policy?

2. Hatfield lost only one month's pay as a result of the alleged wrongful discharge, was he made whole?

3. Hatfield acted in tendering his dues and initiation fee on the advice of the company's agents. Was Hatfield himself interested in his rights under the LMRA? These facts were not relevant at the original hearing on the Board's theory of the case. They seem to be relevant now.

THE QUESTION OF ESTOPPEL.

As indicated, the present record is inadequate because of the Board's refusal to allow further testimony after the original basis of its decision was rejected by this Court. Respondent will not comment on the *Technicolor* holding in view of the fact that the Board in its brief acknowledges it is bound by the decision. (Brief of the Board, 15.) It must be observed that the Board still insists as an alternate ground for its decision that any late tender is valid. This ground for the present decision is clearly erroneous and should be set aside. It is not clear from

the Board's decision whether it would have come to the same conclusion without a finding that late tender is valid. For purposes of argument, Respondent will assume that the Board would have arrived at the same result even though it did not persist in its view with regard to late tender.

The Board did not make a finding with respect to estoppel but in its brief it assumes waiver and estoppel to be the same. ("We submit that on this record the Board properly found such an estoppel or waiver." Brief of the Board, 15.) Respondent believes these two doctrines are distinct and will treat them separately. It might be helpful at the outset to quite precisely define the right which Respondent is supposed to be estopped from enforcing. This the Board has not done.

Absent estoppel Respondent had the right to have Hatfield discharged by the company on the 31st day after Hatfield was employed by the Company unless Hatfield had paid his initiation fee and one month's dues on or before the 30th day of his employment.

Estoppel is an equitable doctrine having slightly different elements in the various equitable jurisdictions. As this Court suggests, the doctrine requires analysis and precise balancing of various interests. This the Board has not done. In the absence of help from the Board and as a point of departure, Respondent will use the statement of the doctrine as contained in 18 *Cal. Jur.* 2d 406,

> "four things are essential to the application of the doctrine. (1) The party to be estopped must

know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury."

Applying these requirements to the instant case, we find that each requirement is totally missing from the facts. First, did the so-called estopping agent of Local 13-433 know the facts? Did Gordon, the shop steward and admittedly the agent of Local 13-433, upon whom the Board relies as creating estoppel, know the facts when he accepted the check-off slip? The Board's brief admits that Gordon did not know the facts. "Gordon had been in the hospital when the ratification (i.e. insistence on discharge) had been voted and was unaware of it on May 13. The Union had failed either to inform him of this action or to modify his authority to sign Hatfield into the organization." Brief of the Board, 19. Gordon not only did not know the facts, but it is clear from the evidence that he was selected by the company's confidential employee, Johnston, as the recipient of Hatfield's tender because he did not know the facts. (R. 89-98, 186-194.) The following question and answer to Mr. Gordon are significant on this point:

"Q. (Mr. Halpin). If you had known on May 13 that a discharge letter had been written on Hatfield, would you have signed him up?

Mr. Scolnik. I object to that.

Trial Examiner. Overruled.

A. I probably wouldn't have." (R. 194.)

Unless the person who is charged with having estopped the union from insisting on discharge knew the facts when he performed his alleged act of estoppel, the union cannot be estopped. The Board disregards the equitable nature of estoppel when it suggests the union had a duty to warn all of its agents not to take Hatfield's dues or face estoppel. The doctrine is quite the other way around. Unless the agent had actual knowledge, he cannot be estopped. In the instant case, we would have had the first element of estoppel only if either Crimmins or Dickey had taken Hatfield's check-off slip.

The second requirement of estoppel is also missing from the present record. There is no evidence that Gordon, by accepting the check-off slip intended Hatfield to act on his conduct. The most that can be said about Gordon's conduct is that it was non-committal. He obviously did not know what was going on and was not informed of the circumstances. (R. 186-194.)

The third requirement of estoppel is that Hatfield must have been ignorant of the true facts when he tendered his check-off slip. This requirement is not only missing from the evidence, but Hatfield's knowledge of the true facts is affirmatively and without contradiction proved. The true facts were that the union wanted Hatfield discharged and would not accept a late tender. The record shows the following:

> "Testimony of Ernest Dickey. . . . Hatfield came up to where I was working and asked me why I didn't have cards for him to sign. I told him that everything was beyond my control at that time and I couldn't let him sign any cards.

> We already had our crew meeting at the camp that night.
>
> Trial Examiner. What night?
>
> The Witness. On the night of the 11th. This was the morning of the 12th. I told him that we had our crew meeting the night before and they had concurred in the action the Business Agent had taken on this." (R. 160.)

Hatfield was not present at the hearing. It is apparent that Hatfield not only knew the union was insisting on his discharge, but that Gordon was selected as the recipient of the check-off slip because Hatfield knew that Gordon was unaware the union was insisting on Hatfield's discharge.

The fourth and last requirement of estoppel is equally conspicuous in the record by its absence. There is no evidence Hatfield relied on Gordon's conduct to his injury. In the first place, there is no evidence Hatfield was injured. It is true he was fired, but for a period of less than one month. He was then rehired and fired again for his own misconduct. (R. 24, 181, 234.) The record does not disclose a wage loss. Furthermore, a conscientious reading of the testimony indicates rather pointedly that Hatfield did not rely on Gordon's conduct. Hatfield knew he was going to be discharged and in a desperate attempt to avoid the inevitable consequences of his own conduct, he, with the assistance of the company's agent, Johnston, obtained a check-off slip from Gordon. (R. 88-97.) There is no evidence he relied on Gordon's conduct. He did not thereafter change his position. The situation might have been different if within the

thirty day period he had obtained a check-off slip from Gordon and Gordon had somehow failed to process the slip. There a plea of equitable estoppel would be compelling. Here the damage had been done through Hatfield's own carelessness and nothing Gordon did or did not do could possibly induce Hatfield to change his position for the worse.

In short, estoppel is not proved. What is more, the Board has totally failed to analyze the problem in line with this Court's suggestion in the *Technicolor* case. Respondent, because of this failure on the part of the Board, has resorted to an admittedly general description of estoppel without detailed reference to cases on the subject. The general description seems appropriate under the circumstances. Respondent regrets that the Board did not take the opportunity presented here to reopen the case, accept further evidence and hear argument on the rather complicated and important legal problem. Having failed to allow the matter to be adequately presented, Respondent believes the Board's decision should be reversed and the petition for enforcement denied.

THE QUESTION OF WAIVER.

As previously indicated, estoppel and waiver mean two different things. Respondent wishes to point out that in the *Technicolor* case this Court made no suggestion that waiver would be a further exception to the 30 day exception allowed by the Act. However, it has been said that a party can waive anything except perhaps his constitutional rights in a criminal

case. The Board in its brief is obviously relying on waiver rather than estoppel. What has been previously said concerning a lack of opportunity to argue and present further evidence is applicable to waiver as well as estoppel.

California Jurisprudence is of some help to us here as it was in considering estoppel. 25 *California Jurisprudence* 926 puts the problem as follows:

> ". . . it is a general doctrine that to constitute a waiver there must be an existing right, benefit or advantage; a knowledge, actual or constructive, of its existence; and an actual intention to relinquish it or such conduct as warrants an inference of the relinquishment. It has been held that there must be a meeting of the minds and an intentional forbearance to enforce a right. Waiver is a voluntary act and implies an abandonment of a right which can be enforced, or of a privilege which can be exercised—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon."

Waiver obviously is a legal, rather than an equitable doctrine. It is, in effect, a form of contract. The important distinction between estoppel and waiver is the requirement that to have a waiver one must have a meeting of the minds.

The Board has not defined waiver in either its decision or its brief. Not one single authority is cited on the subject. We have no idea what the Board means by waiver. No attempt is made to compare the evidence in this case with the accepted elements of

waiver. Because of this, Respondent will satisfy itself with a brief comparison of the evidence with the doctrine as generally defined by California Jurisprudence.

Three elements are required. One, existing right; two, a knowledge of the existence of the right; three, an actual or constructive intent to give up the right.

There can be no question that Respondent had the right to have Hatfield discharged and that Respondent knew it had this right. (Gordon, on the other hand, probably did not know about the right of discharge.) The first two elements of waiver are present here.

The third requirement is not present. The evidence discloses that the Respondent had no intention at any time of giving up its right to have Hatfield discharged. It is difficult to see how the Respondent's intention could be more plainly demonstrated than was demonstrated in this case. Two formal letters were sent to the company. Action was taken at two union meetings. The shop steward, Dickey, told Hatfield of the union's position and so did the business agent, Crimmins. The only evidence of intention to waive must come from Gordon. As previously indicated, Gordon testified he had no intention to waive the union's right. (R. 194.) What is more important, Gordon had no authority to waive the rights of the union. The Board in its brief approaches this question obliquely. It suggests Gordon had authority to sign Hatfield into the union. (Brief of Board, 19.) This is, of course, true. The Board, however, does not treat the real question. Did Gordon have author-

ity to waive the union's right to discharge Hatfield and did he intentionally waive the union's right in this case? Clearly Gordon did not intentionally waive the union's right because he did not know the union was standing on its right. One cannot intentionally give up a right one knows nothing about.

> "The burden is upon the party claiming a waiver to prove it by such evidence as does not leave the matter doubtful or uncertain." 25 *California Jurisprudence* 932.

There is nothing in the record to indicate that Gordon had the authority to waive the union's rights. The only evidence adduced indicates he did not have the right. (R. 202.) The vice of the Board's arbitrary and unnoticed change in theory is obvious when we consider this problem of waiver. The evidence is so skimpy on the subject that no intelligent evaluation of it may be made. However, the burden is on the party alleging the waiver to prove it. Here the burden was not met and the only evidence on the subject indicates the Respondent to be correct.

CONCLUSION.

Respondent contends the petition for enforcement of the Board's order should be denied. The Board has had ample opportunity to make its case. It has not done so. On the present record, Respondent is, at least, entitled to have the matter remanded for further proceedings. Respondent earnestly requests, however, that the petition be denied without further proceed-

ings. If the Board has evidence of waiver or estoppel it can start over again with a new complaint. Harassment of the Respondent will inevitably result if the Board is given a further opportunity to proceed on the present case.

Dated, Redding, California,
November 25, 1958.

Respectfully submitted,
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